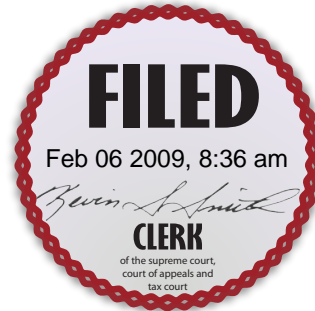


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DARRELL L. MANUEL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 32A05-0807-PC-437

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause No. 32D01-0401-PC-1

FEBRUARY 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

Darrell Manuel appeals the denial of his petition for post-conviction relief. We affirm.

The sole issue for our review is whether the trial court erred in denying Manuel's petition.

This court set forth the following facts in Manuel's direct appeal:

The facts most favorable to the convictions indicate that on September 17, 2001, Manuel molested his ten-year-old daughter, D.M. while babysitting her in his trailer. Manuel touched D.M.'s anus and vagina with his hands, anally and vaginally penetrated her with his penis, and had her perform fellatio.

On September 18, 2001, D.M. told school officials that her father had raped her. That day, a doctor examined D.M. An oral swab tested positive for seminal material but negative for DNA material. Remaining tests detected no additional signs of molestation.

The State charged Manuel with two counts of Class A felony child molesting for performing sexual intercourse and deviate sexual conduct with D.M. and one count of Class C felony child molesting for fondling and touching D.M. On October 9, 2002, a jury found Manuel guilty as charged.

Manuel v. State, 793 N.E.2d 1215, 1217 (Ind. Ct. App. 2003), *trans. denied*. Following a sentencing hearing, the trial court found the following aggravating factors: 1) Manuel's criminal history consisting of a misdemeanor battery conviction; 2) Manuel was in need of corrective rehabilitative treatment which could best be provided by commitment to a penal facility; 3) a reduced or suspended sentence would depreciate the seriousness of the crime; and 4) the victim was under twelve years of age. The trial court found no mitigating factors. The trial court then sentenced Manuel to 35 years and 152 days for each class A felony conviction and five years and 152 days for the class C felony. The

court further ordered the sentences to run consecutively for a total sentence of 76 years and 91 days.

On direct appeal, Manuel argued that the trial court erred in instructing the jury and in admitting D.M.'s testimony regarding prior uncharged molestations. He also argued that trial counsel was ineffective for failing to object to D.M.'s testimony regarding the prior molestations. We found that Manuel failed to object to the challenged instruction at trial, and that the trial court did not commit fundamental error in giving it to the jury. *Id.* at 1218. We also found that D.M.'s testimony about the prior uncharged molestations was brief and vague. In light of the strength of the case against Manuel, we concluded that the admission of D.M.'s testimony was not fundamental error, and that trial counsel was not ineffective for failing to object to it. *Id.* at 1220-21.

Manuel filed a *pro se* petition for post-conviction relief in 2004. Post-conviction counsel filed an amended petition in 2007. At a May 2008 hearing, appellate counsel testified that he was a public defender for five years before becoming a superior court judge. According to counsel, he "looked at the record and considered what [he] thought were a possibility of meritorious defenses." P.C.R. Tr. at 5. He explained that "at the time [he] raised what issues [he] felt were appropriate to be raised and the ones that were meritorious and had the best chance of success for Mr. Manuel." P.C.R. Tr. at 6. Specifically, counsel explained that he believed the strongest issue was his challenge to the jury instruction, which he still believed was a problem at the time of the post-conviction hearing. He also remembered that he considered the possibility of challenging

the admission of the videotape of the victim's statement, but that after reviewing the transcript, he felt that "from a tactical standpoint [it] was not a meritorious appeal argument. . . ." P.C.R. Tr. at 4. He also explained that he does not "just throw every possible issue into [his] appeal [because he] is bound by the ethical rules not to make a frivolous appeal argument. . . ." P.C.R. Tr. at 5. The post-conviction court denied Manuel's petition, and he appeals.

Manuel's sole contention is that the post-conviction court should have granted his petition because he received ineffective assistance of appellate counsel. The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. *Dawson v. State*, 810 N.E.2d 1165, 1171 (Ind. Ct. App. 2004), *trans. denied*. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* at 1171-72. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads us to but one conclusion and the post-conviction court has reached the opposite conclusion. *Id.* at 1172.

Ineffective assistance of counsel claims are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). According to this test, Manuel must first establish that his counsel's performance was deficient. *See id.* This requires a showing that his counsel's representation fell below an objective standard of

reasonableness and that the errors were so serious that they resulted in a denial of Manuel's Sixth Amendment right to counsel. *See id.*

Second, Manuel must demonstrate that the deficient performance prejudiced his defense. *See id.* In order to establish prejudice, Manuel must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The Indiana Supreme Court has recognized that a strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Morgan v. State*, 755 N.E.2d 1070, 1072 (Ind. 2001).

Although we have generally considered claims of ineffective assistance of counsel of trial and appellate counsel as analogous, there are significant differences between the roles of appellate and trial counsel. *Dawson*, 810 N.E.2d at 1173. The Indiana Supreme Court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. *Timberlake v. State*, 753 N.E.2d 591, 604 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002).

Here, Manuel argues that he was denied the effective assistance of appellate counsel because counsel failed to raise two issues. Specifically, Manuel contends that appellate counsel should have challenged both his sentence and the admission into

evidence of the videotape of the victim's interview with a Hendricks County Office of Family and Children case manager.

Appellate counsel's decision regarding what issues to raise and what arguments to make is one of the most important strategic decisions to be made by appellate counsel. *Bieghler v. State*, 690 N.E.2d 188, 193-94 (Ind. 1997), *cert. denied*, 525 N.E.2d 1021. Therefore, when claiming that appellate counsel provided ineffective assistance regarding the selection and presentation of issues, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000), *cert. denied*. Reviewing courts should be particularly deferential when accessing challenges to an appellate counsel's strategic decision to include or exclude issues unless such a decision was "unquestionably unreasonable." *Id.*

Appellate counsel's performance, as to the selection and presentation of issues, will thus be presumed adequate unless found unquestionably unreasonable considering the information available in the trial record or otherwise known to appellate counsel. *Id.* To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must therefore show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *Id.*

We now turn to the substance of Manuel's claims. He first contends that appellate counsel was ineffective because counsel failed to challenge Manuel's sentence.

According to Manuel, appellate counsel should have challenged several aggravating factors; the lack of mitigating factors, including Manuel's illiteracy, successful completion of a prior probationary period, and recommendations for leniency from Manuel's family and friends; and the trial court's decision to run the sentences consecutively.¹

However, we observe that Manuel was sentenced to 76 years and 91 days for raping, sodomizing, and engaging in other sexual acts with his ten-year-old daughter. We further observe that Manuel has a prior criminal history, and that a single aggravating factor may be used both to enhance a sentence and to impose consecutive sentences. *Haggard v. State*, 771 N.E.2d 668, 676 (Ind. Ct. App. 2002), *trans. denied*. Manuel has not shown that his sentence would have been different if appellate counsel had not made the alleged errors or that counsel's failure to present this issue cannot be explained by any reasonable strategy.

Manuel also argues that appellate counsel was ineffective for failing to challenge the admission into evidence the videotape of the victim's statement to the Hendricks County Office of Family and Children case worker. However, at the post-conviction hearing, appellate counsel explained that he made a strategic decision not to raise this issue. In the absence of a contrary showing, we assume that Manuel's appellate counsel made a strategic decision not to overload the appellate court with a slew of arguments of

¹ Manuel has waived the issue concerning appellate counsel's failure to challenge the appropriateness of his sentence because he failed to present a separate argument and authority in support of his contention. See *Johnson v. State*, 832 N.E.2d 985, 1006 (Ind. Ct. App. 2005), *trans. denied*.

dubious merit, but rather chose to focus in on only Manuel's strongest claims on appeal. Manuel has failed to show that his counsel's strategic decision to focus in on the strongest claims rather than raise every potential claim available to Manuel on appeal was unquestionably unreasonable. Because Manuel has failed to show that his counsel's strategic decisions were unquestionably unreasonable or that the outcome of his appeal would have been different had his appellate counsel argued that the trial court erred in admitting this evidence, the post-conviction court properly denied his claim for relief on this basis.

Manuel has failed to raise any claim that has convinced us that the result of his appeal would have been different had his appellate counsel chosen to raise the additional issues on direct appeal. The post-conviction court properly denied Manuel's claim of ineffective assistance of appellate counsel.

Affirmed.

BARNES, J., and VAIDIK, J., concur.